

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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LORENZO HARRIS,

Plaintiff,

v.

OPINION AND ORDER

13-cv-560-wmc

CORRECTIONAL OFFICER HERSHBERGER,

Defendant.

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In this proposed civil action, plaintiff Lorenzo Harris alleges that defendant Hershberger, a correctional officer at Columbia Correctional Institution, retaliated against him in violation of the First Amendment of the United States Constitution. Harris requested leave to proceed under the *in forma pauperis* statute, 28 U.S.C. § 1915. From the financial affidavit Harris provided, the court concluded that he was unable to prepay the full fee for filing this lawsuit. Harris has since made the initial, partial payment of \$74.00 required of him under § 1915(b)(1). Because Harris was incarcerated at the time he filed the complaint, however, this court must also screen the merits of his complaint and dismiss any aspect of the complaint that is (1) frivolous or malicious; (2) fails to state a claim on which relief may be granted; or (3) seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915A. For the reasons provided below, the court finds Harris has failed to state a claim on which relief may be granted and denies him leave to proceed.

## ALLEGATIONS OF FACT

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). In his complaint, Harris alleges, and the court assumes for purposes of this screening order, the following facts:

On April 25, 2013, at approximately 7:15 p.m., Harris and other inmates were allowed to leave their cells to participate in "Dayroom." In Dayroom, up to forty prisoners are allowed to socialize, including playing games that include cards and dominoes. In order to reduce the noise of the table games, staff provide prisoners with sheets to cover the tables.

After arriving in Dayroom, Harris and other inmates asked the floor officer defendant Hershberger for table sheets. Hershberger denied the request. In response, Harris and other inmates complained to Hershberger's supervisor Sgt. Julson in Hershberger's presence. Julson, who was in the security bubble, then telephoned Hershberger and instructed him to provide sheets. Hershberger initially refused, but then "finally got up and walked around the Dayroom a few times before finally stomping into the laundry room to get the sheets." (Compl. (dkt. #1) ¶ 10.)

Hershberger returned with the sheets, "yell[ing] angrily, 'Here are you[r] guys' sheets!'" He then threw "the sheets to the ground almost hitting a prisoner in the leg and yelled, 'Get them! Get the fucking sheet!'" (*Id.* at ¶ 11.) In response, Harris alleges that he asked Hershberger to pick the sheets up off of the floor, which Hershberger refused to

do. “Harris then told Hershberger that if he did not pick up the sheets he was going to write him up.” (*Id.* at ¶ 13.)

Hershberger allegedly “responded by pushing his panic body alarm button and told Harris to sit down, which Harris did.” (*Id.* at ¶ 14.) Seconds later, staff came into the Dayroom, handcuffed Harris, removed him from general population and held him in segregation until the next day, April 26, 2013.

On April 29, 2013, Harris received Conduct Report No. 2236558, in which Hershberger alleged that Harris violated certain prisons rules for disruptive conduct, disobeying orders and threats based on the April 25, 2013, exchange in the Dayroom. Harris was found guilty of disobeying orders and punished with 30 days of cell confinement. On appeal, the warden reversed the hearing’s findings.

## OPINION

“An act taken in retaliation for the exercise of a constitutionally protected right violates the Constitution.” *DeWalt v. Carter*, 224 F.3d 607, 618 (7th Cir. 2000). To state a claim for retaliation under the First Amendment, Harris must allege that: (1) he engaged in a constitutionally protected activity; (2) he suffered a deprivation that would likely deter a person from engaging in the protected activity in the future; and (3) the protected activity was a motivating factor in defendants’ decision to take retaliatory action. *Bridges v. Gilbert*, 557 F.3d 541, 546 (7th Cir. 2009) (citing *Woodruff v. Mason*, 542 F.3d 545, 551 (7th Cir. 2008)). Plaintiff’s complaint appears to satisfy the second and third element, but the court finds that plaintiff has failed to allege that he engaged in

constitutionally protected activity. Indeed, based on the allegations themselves, Harris was not so engaged.

While a prisoner's right to use available grievance procedures has been recognized as a constitutionally protected activity, a verbal complaint may constitute protected speech only if it is "in a *manner* consistent with his status as a prisoner." *Watkins v. Kasper*, 599 F.3d 791, 798 (7th Cir. 2010) (quoting *Freeman v. Tex. Dep't of Criminal Justice*, 369 F.3d 854, 865 (5th Cir. 2004)). In *Watkins*, the inmate alleged that the prison librarian retaliated against him after he complained about a library policy restricting his ability as a law clerk to maintain personal materials at the library and assist other inmates with their legal claims. In considering whether an oral complaint constituted protected activity, the Seventh Circuit held that as a matter of law "the confrontational, disorderly manner in which Watkins complained about the treatment of his personal property removed this grievance from First Amendment protection." 599 F.3d at 798. Citing other cases, the court further explained that "[t]he confrontational approach that Watkins used to make his grievance was inconsistent with the legitimate penological interest of prison discipline and order." *Id.*

Here, Harris alleges that he "asked Hershberger to pick the sheets up off the ground," and "then told Hershberger that if he did not pick up the sheets[,] he was going to write him up." (Compl. (dkt. #1) ¶¶ 12-13.) Plaintiff's own allegations -- even disregarding Hershberger's account as provided in the conduct report -- removes his oral complaint from First Amendment protection. First, asking a guard to pick up sheets for card games -- even if the guard needlessly, recklessly or even intentionally threw them to

the ground -- falls far short of the penological interest of fostering personal learning or facilitating inmates' legitimate legal claims. Second, doing so in the presence of other inmates further escalated an otherwise trivial situation to the point of an outright confrontation and challenge to the guard's authority. Third, Harris's statement to Hershberger does not constitute a constitutionally-protected, verbal complaint. Rather, Harris simply threatened to "write him up" (file a grievance) in an attempt to force Hershberger to pick up the sheets. The Seventh Circuit has cast significant doubt on whether a threat to file a grievance constitutes protected activity. *See Bridges*, 557 F.3d at 555 ("But it seems implausible that a threat to file a grievance would itself constitute a First Amendment-protected grievance.").

#### ORDER

IT IS ORDERED that plaintiff Lorenzo Harris's motion for leave to proceed is DENIED, and plaintiff's claim is dismissed. The clerk of court is directed to close this case.

Entered this 23rd day of October, 2014.

BY THE COURT:

/s/

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WILLIAM M. CONLEY  
District Judge